

STATE OF MICHIGAN
IN THE SUPREME COURT

ELIZABETH A. COOK,

Plaintiff-Appellee,

vs.

CHRISTOPHER W. HARDY,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 250727

Ingham County Circuit
Court No. 02-1399-NI

DENNIS D. ALBERTS (P26348)
MICHAEL A. ROSS (P45266)
Attorneys for Plaintiff-Appellee
1869 East Maple Road
Troy, MI 48083
(248) 362-3707

MARY T. NEMETH (P34851)
Co-Counsel for Defendant-Appellant
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200

THOMAS C. LEFLER, JR. (P33735)
Attorney for Defendant-Appellant
40900 Woodward Avenue, Suite 200
Bloomfield Hills, MI 48304-2255
(248) 258-2284

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PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

By: Dennis D. Alberts (P26348)
Michael A. Ross (P45266)
OGNE, ALBERTS & STUART, P.C.
Attorneys for Plaintiff-Appellee
1869 East Maple Road
Troy, MI 48083
(248) 362-3707

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CORRECTLY GRANTED SUMMARY DISPOSITION IN FAVOR OF PLAINTIFF ON THE SERIOUS IMPAIRMENT OF BODY FUNCTION ISSUE, WHERE PLAINTIFF'S MULTIPLE LEG FRACTURES CONSTITUTED AN OBJECTIVELY MANIFESTED IMPAIRMENT OF AN IMPORTANT BODY FUNCTION THAT AFFECTED PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE, AS A MATTER OF LAW?

Defendant-Appellant states:	No
Plaintiff-Appellee states:	Yes
The Trial Court answered:	No
The Court of Appeals answered:	Yes

COUNTER-STATEMENT OF JURISDICTION

Plaintiff-Appellant Elizabeth Cook acknowledges that the Supreme Court properly has jurisdiction to entertain this application for leave to appeal. However, Plaintiff opposes the application, because the Court of Appeals committed no error whatsoever, because the Court of Appeals decision correctly follows Supreme Court precedent, and because Defendant has otherwise failed to establish any of the grounds for granting leave to appeal set forth in MCR 7.302(B).

MCR 7.302(B) lists the grounds that an application for leave to appeal "must show" in order for the Supreme Court to grant leave to appeal. None of those grounds apply to this appeal. The Supreme Court has already resolved the issues of statutory construction and other issues involving "legal principles of major significance to the state's jurisprudence," MCR 7.302(B)(3), when it recently interpreted the very same provisions of the No-Fault Act in Kreiner v Fischer, 471 Mich 109, 683 NW2d 611 (2004). There simply is no conflict in any Court of Appeals decisions or Supreme Court decisions that needs to be resolved. MCR 7.302(B)(3) and (5). For the reasons set forth below, the Court of Appeals in this case correctly applied Kreiner, the result it reached is consistent with Kreiner, and therefore the Court of appeals decision is not erroneous. MCR 7.302(B)(5). Therefore, the Supreme Court should deny Defendant's application for leave to appeal.

COUNTER-STATEMENT OF FACTS

This case involves a serious, high impact, motor vehicle/pedestrian accident that occurred on January 15, 1999. Plaintiff described the incident during her deposition as follows:

Q: And then describe for me what happened after you exited the back door of the Peanut Barrel?

A: We walked down the alley towards my apartment. We were almost to the street. We were kind of at the end of the alley when the car sped around the corner and kind of hit my brother's hand as we were walking past. And my brother turned around and said something to him and I looked back and saw him slam on the brakes and saw his reverse lights go on. And I said he is reversing. So we all looked back and he was just going, I mean as fast as he could from about 20 yards away. And they all got out of the way and I couldn't get out of the way and he ran into me with his back bumper.

(E. Cook dep. tr., pg. 32; Exhibit A to Plaintiff's Response to Defendant's Motion for Summary Disposition).

Defendant's rear bumper struck Plaintiff's right leg, throwing her eight to ten feet in the air. (*Id.* at pg. 15). Defendant then fled the scene.

In his Application for Leave to Appeal, Defendant makes the same misstatement of facts as the trial court did in originally granting summary disposition in favor of Defendant. Specifically, Defendant erroneously claims that Plaintiff's multiple fractures to her right leg "healed without complications within six weeks." (Defendant-Appellee's Brief, pp. 1, 13, 14). The trial court similarly concluded that Plaintiff's "lifestyle was only altered before and after by a minimum of six weeks." (August 6, 2003 Hearing Transcript, pp. 13-14). Defendant and the trial court both ignored the documentary evidence submitted in connection with the summary disposition motions, which proves

that Plaintiff's impairment in fact lasted much longer than the six-week period immediately following the accident when she wore a leg cast.

Plaintiff submitted evidence in connection with the summary disposition motions, demonstrating her active lifestyle before the accident, which included numerous sports, as well as her education and employment in film. As such, Plaintiff's lifestyle required her to work with heavy camera equipment and lighting equipment, in addition to the sporting activities. (E. Cook dep. tr., pp. 17-20, 36-37; Exhibit A to Plaintiff's Response to Defendant's Motion for Summary Disposition).

The multiple leg fractures Plaintiff sustained in the subject motor vehicle accident prevented Plaintiff from engaging in all of her normal activities for much longer than the six-week period when she was totally disabled while wearing a leg cast. Her impairment lasted in excess of six months, not the six weeks on which the trial court based its decision. Plaintiff's actual impairment and the timeline of her recovery are as follows.

Immediately after the accident Plaintiff was taken to Sparrow Hospital, where she was hospitalized overnight. (Id.). X-rays revealed multiple leg fractures: A re-fracture of the mid shaft of the tibia, as well as a possible repeat fracture of an earlier fibular injury. (Sparrow Hospital Emergency Department Report, pg. 1; Exhibit B to Plaintiff's Response to Defendant's Motion for Summary Disposition).¹ The x-rays also revealed

¹ Plaintiff had a pre-existing right leg fracture; however, she had completed her treatment for the prior fracture, was no longer under the care of any physician, and had no restrictions on her activities at the time of the accident. (E. Cook dep. tr., pg. 12-13, 15).

that the force of the impact had bent the tibial rod approximately four centimeters.² (Id.). She was given pain medication and discharged to the care of her orthopedic surgeon.

Plaintiff's orthopedic surgeon placed her in a hard cast on the right leg. She wore the cast and had to use crutches for six to eight weeks, during which time she remained in pain and was restricted from walking or running. (E. Cook dep. tr., pg. 15-17; Exhibit A to Plaintiff's Response to Defendant's Motion for Summary Disposition).

At the time of the accident, Plaintiff was a film student, who also worked at Moto Photo, processing film in her spare time. (Id. at pg. 20). The injuries she sustained in this motor vehicle accident caused her to miss work at Moto Photo during the time she was in a cast. (Id.). Her injuries also prevented her from taking an independent study film course the following semester, because she could not lug around the camera and lighting equipment due to her injuries. (Id. at 17-18). She also had to cancel her pre-planned vacation to Cancun. (Id. at 26).

Even after the cast was removed, Plaintiff could not resume her normal activities. As stated, she could not carry around the heavy film equipment required for her independent study. She also could not run or engage in any of the sporting activities she previously engaged in that involved any kind of impact. (Id. at 37).

Defendant's continued argument that Plaintiff's impairment lasted only 6 weeks is unsupported by any reference to the lower court record and directly refuted by the evidence Plaintiff presented below. That evidence is unrefuted, and the Court of

² Defendant correctly notes that Plaintiff received no additional treatment to straighten the bent tibial rod; however, this is still an objective and permanent medical condition caused by the subject motor vehicle accident.

Appeals correctly recognized that it established an impairment lasting more than 6 months, not the 6 weeks claimed by Defendant and the trial court:

The activities the trial court focused on, to which Plaintiff returned, did not resume until six months or more after her injuries. It is clear to us that Plaintiff's impairment was significant and extensive. (Court of Appeals Decision, p. 3).

Plaintiff was placed in a hard cast and given crutches for her multiple leg fractures, and these injuries prevented her from running and walking, while at the same time causing her great pain. (E. Cook dep. tr., pp. 15-17). She was unable to work at all at Moto Photo during the time she was in the cast, approximately six to eight weeks. (Id. at 20). Because she could not lug around the camera equipment and lighting equipment, Plaintiff had to cancel her independent study course the semester following the motor vehicle accident. (Id. at 17-18). This caused her to miss 50% of her course load that semester (she was only registered for 2 classes at the time of the accident). It was not until the following summer that she was able to perform the physical requirements necessary to complete this independent study course. (Id.). Even after the cast was removed, Plaintiff could not engage in her normal activities, including impact sports, for a period well in excess of the initial 6-week recovery time. (Id., at 37-38).

Defendant continues to ignore Plaintiff's deposition, wherein she clearly testified that she could not perform her photographing activities and could not engage in "any activities that involved impact, like any sports" even after the cast was removed. (Plaintiff's dep. tr., pp 18-19, 37-38). She was not able to resume these activities until the following summer at the earliest, which is six months after the accident; not six weeks. (Id.). The vacations, skateboarding, and employment as a costume

maker on film sets, relied upon by Defendant and the trial court (8-6-03 Hearing Tr, p 14), all occurred **after** the summer of 2000, more than six months, not six weeks, after the December 16, 1999 accident. The skateboarding accident occurred in the spring of 2002. (Plaintiff's dep tr, pp 37-38). Plaintiff did not finish her independent film study until the summer of 2000 (Id., at 18-19) and did not start working as a costume maker on film sets until the summer of **2001** (Id., at 5, 8, 24). The vacations Plaintiff took after the accident were also in the late summer of 2000. (Id., at 26-27). Finally, Plaintiff testified that she was still unable to engage in all of her previous sporting activities. (Id., at 37). The Court of Appeals correctly rejected Defendant's unsupported claim that the injuries completely healed without complications in just 6 weeks. (Court of Appeals decision, p. 3).

Defendant also falsely states in his application for leave to appeal that the restrictions on Plaintiff's ability to return to her job at Moto Photo, as well as her restrictions on recreational and sporting activities "were self-imposed, not physician-imposed." (Defendant's Application for Leave to Appeal, p. 6). In fact, these restrictions were physician-imposed. Plaintiff never returned to work at the Moto Photo after the accident, because she was wearing a leg cast at the time that virtually eliminated all of her physical activities during the initial 6 to 8 week period following the accident. Her physician, Dr. Pack, told Plaintiff the day after the accident that "she can start partial weight-bearing as tolerated." (12/16/99 Note, Appendix B to Defendant's Application for Leave to Appeal). When Plaintiff returned to Dr. Pack six weeks later on February 10, 2000, he noted that she was still walking with a crutch and still had a leg brace which she apparently was not wearing at the time. (2/10/00 Note, Appendix B to Defendant's

Application for Leave to Appeal). Although Dr. Pack told Plaintiff that she could "ditch the crutch" on February 10, 2000, he did not clear her to resume full weight-bearing on the leg, nor did he clear her to resume all prior work and recreational activities. (Id.). The previous restriction to resume physical activities "as tolerated" was still in effect. (Id.). Dr. Pack did not discharge Plaintiff from his care until March 29, 2001, when he instructed her to return if needed. (3/29/01 Note, Appendix B to Defendant's Application for Leave to Appeal).

The Court of Appeals correctly examined all the undisputed facts and correctly concluded that "it is clear to us that Plaintiff's impairment was significant and extensive." (Court of Appeals Decision, p. 3). The Court of Appeals specifically followed Kreiner, including Kreiner's ruling that even impairments of short duration can be sufficient to meet the serious impairment threshold. (Id.). The Court of Appeals concluded "under the totality of the circumstances in this case, including the seriousness and extent of fractures, the nature and extent of treatment with casting and crutches, and the lifestyle alterations, all support a finding that Plaintiff suffered a serious impairment of body function as a matter of law." (Id.). Because this decision is clearly correct and consistent with Kreiner and other Supreme Court precedent, the Supreme Court should deny Defendant's Application for Leave to Appeal.

ARGUMENT

THE COURT OF APPEALS CORRECTLY GRANTED SUMMARY DISPOSITION IN FAVOR OF PLAINTIFF ON THE SERIOUS IMPAIRMENT OF BODY FUNCTION ISSUE, BECAUSE PLAINTIFF'S MULTIPLE LEG FRACTURES CONSTITUTED AN OBJECTIVELY MANIFESTED IMPAIRMENT OF AN IMPORTANT BODY FUNCTION THAT AFFECTED PLAINTIFF'S GENERAL ABILITY TO LEAD HER NORMAL LIFE, AS A MATTER OF LAW.

Under Michigan's No-Fault Act, a person injured in an automobile accident may recover non-economic losses only if she has suffered death, serious impairment of body function, or permanent serious disfigurement. MCLA 500.3135(1). The No-Fault Act defines "serious impairment of body function" as "...an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCLA 500.3135(7). The serious impairment issue is generally a question of law, absent an outcome-determinative factual dispute. MCLA 500.3135(2)(a) provides as follows:

The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

- (i) There is no factual dispute concerning the nature and extent of the person's injuries.
- (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement....

In this case, the trial court and the Court of Appeals held that there was no factual dispute concerning the nature and extent of Plaintiff's injuries.

In May v Sommerfield (After Remand), 240 Mich App 504; 617 NW2d 920 (2000), the Court of Appeals held that it was proper for the trial court to compare plaintiff's lifestyle before and after the accident to determine whether a factual dispute existed with respect to the extent of plaintiff's injuries. To determine whether the impairment of an important body function is serious, the court should consider factors such as the extent of the injury, the treatment required, the duration of the disability, and the extent of residual impairment and prognosis for eventual recovery. Kreiner v Fischer, 471 Mich 109, 132-134, 683 NW2d

611(2004). In assessing the extent of the injury, the court may compare the Plaintiff's lifestyle before and after the accident. May v Sommerfield (After Remand), 240 Mich App 504; 617 NW2d 920 (2000). **Importantly, an injury need not be permanent to be serious.** Kreiner, supra, at 134; Cassidy v McGovern, 415 Mich 483, 505; 330 NW2d 22 (1982)

In the case at hand, the Court of Appeals followed all the requirements of Kreiner by engaging in the "multi-faceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life." Kreiner, supra. The Court of Appeals also applied the non-exhaustive list of objective factors described in Kreiner. (Court of Appeals Decision, p. 2). Finally, the Court of Appeals considered "the totality of the circumstances" as required by Kreiner, supra, at 134. (Court of Appeals Decision, p. 3). As such, the Court of Appeals correctly concluded that under Kreiner Plaintiff sustained a serious impairment of body function as a matter of law. (Id).

Although Defendant disagrees with the result reached by the Court of Appeals in this case, neither Defendant nor the dissent challenges the legal analysis the Court of Appeals employed pursuant to Kreiner. The Kreiner Court held that the plaintiffs in those companion cases could not meet the serious impairment threshold as a matter of law, a result explained by the vastly different facts in those cases. Kreiner and its companion case Straub v Collette are both distinguishable on their facts. The Supreme Court held that the plaintiff in Kreiner had failed to satisfy the no-fault threshold because "his injuries did not cause him to miss one day of work," and because he was still able to do all of his construction activities with the exception of roofing work after the

accident. 471 Mich at 137. The court also noted that the plaintiff in Kreiner could still hunt deer, even though his injuries prevented him from hunting rabbits. Id.

Similarly, the Supreme Court held that the plaintiff in the companion case (Straub) had failed to satisfy the no-fault threshold because his injuries were clearly minor. In Straub the plaintiff suffered a minor injury to his non-dominant hand, consisting of a broken “pinky” finger and tendon injuries to two fingers. The plaintiff wore a cast for about one month, and the injuries completely healed in just two months. During this short recuperation, the plaintiff could not work as a cable lineman and could not play bass guitar in his band. The Court held these minor, short-term injuries were insufficient to satisfy the serious impairment threshold.

The facts in the case at hand are clearly distinguishable. In this case, Plaintiff's multiple leg fractures completely prevented her from working as a film processor during the six-week period she was in a cast. They also completely prevented Plaintiff from working with the heavy camera equipment and lighting equipment required by her film studies until the summer following the accident, a period in excess of six months. Moreover, Plaintiff was completely precluded from performing any of her physical and sporting activities during the six-week period she was in a cast, and for a substantial period thereafter.

The Supreme Court has long recognized the qualitative difference between the objectively-manifested and serious fractures involved in this case, and the type of minor, soft-tissue injuries the no-fault threshold was intended to preclude. Kreiner did not overrule Cassidy v McGovern, 415 Mich 483, 330 NW2d 22 (1982). In Cassidy, the Michigan Supreme Court held that plaintiff had established a serious impairment of

body function as a matter of law under facts virtually identical to those in the case at hand. As in this case, the plaintiff in Cassidy suffered multiple leg fractures, wore various casts for several months, and had to limit his activities during his recovery. Cassidy, supra, at 505. The Cassidy Court noted that the plaintiff's injuries in that case "had healed well and that there was no significant residual damage." Id. at 504. Nonetheless, the Cassidy Court held that the injuries did not need to be permanent in order to meet the threshold. Id. at 505. Under these facts, the Cassidy court held that the plaintiff had sustained a serious impairment of body function as a matter of law. As in Cassidy, Plaintiff's injuries in the case at hand "were not general aches and pains, but rather two broken bones." Cassidy, supra, at 505.

Similarly, in LaHousse v Hess, 125 Mich App 14; 336 NW2d 219 (1983), the Michigan Court of Appeals held that injuries substantially similar to those in the case at hand constituted a serious impairment of body function as a matter of law. The plaintiff in LaHousse broke her left femur, was hospitalized, and had to use a cast and crutches for three months. The Court of Appeals followed Cassidy and held that the plaintiff had suffered a serious impairment of body function as a matter of law. 125 Mich App at 18-19. The Court of Appeals reached the same result in Kern v Blethen-Coluni, 240 Mich App 333 (2000), again recognizing that a serious femur fracture causing the plaintiff to be unable to walk for three months was a serious impairment of body function as a matter of law, despite the fact that the plaintiff made a good recovery thereafter. Kern, supra, at 343-344.

Therefore, the Court of Appeals correctly applied Kriener and the no-fault statute to the facts in the case at hand. The decision of the Court of Appeals is clearly correct,

and the result is absolutely consistent with precedent from both the Supreme Court and the Court of Appeals. All the "legal principles of major significance to the state's jurisprudence" have already been resolved by the recent decision in Kreiner, and this appeal raises no new issues. MCR 7.302(B)(3). Because the Court of Appeals committed no error whatsoever, and because the decision does not conflict with any precedent, Defendant's Application for Leave to Appeal fails to demonstrate any ground for granting leave or any other relief in the Supreme Court. MCR 7.302(B)(5). Therefore, the Supreme Court should deny Defendant's application for leave to appeal.

RELIEF SOUGHT

Plaintiff-Appellant Elizabeth Cook respectfully requests the Michigan Supreme Court deny Defendant's application for leave to appeal and deny Defendant's request for peremptory reversal.

OGNE, ALBERTS & STUART, P.C.

By:



DENNIS D. ALBERTS (P26348)
MICHAEL A. ROSS (P45266)
Attorneys for Plaintiff-Appellee
1869 East Maple Road
Troy, MI 48083
(248) 362-3707

Dated: April 22, 2005